93-719

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

FIGGIE INTERNATIONAL, INC.,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether, in an action for consumer redress under Section 19(a)(2) of the Federal Trade Commission Act, the Federal Trade Commission is required to establish that the defendant's acts and/or practices constituted knowing or reckless, not merely negligent, conduct.

II. Whether, in an action for consumer redress under Section 19(a)(2) of the Federal Trade Commission Act, the Federal Trade Commission must establish actual consumer reliance and actual consumer injury as a prerequisite to obtaining summary judgment in an amount not to exceed $49,950,000.

LIST OF PARTIES AND RULE 29.1 LIST

A. PARTIES BEFORE THE COURT:

The parties to the proceedings below were the petitioner Figgie International, Inc. (defendant below) and the respondent Federal Trade Commission (plaintiff below). All parties below are before the Court.

B. CORPORATE AFFILIATIONS:

Figgie International, Inc. has no parent company. It has the following subsidiaries which are not wholly owned: Alfa Costruzioni Mecchaniche SpA (86%); Figgie Investment Trustee Ltd. (50%); Figgie Pension Trustee Ltd. (50%); Logan/Glidepath Company (80%); Kohol Inc. (51%); Logan Glidepath New Zealand Limited (75%); and Mojonnier de Mexico S de R.L. de C.V. (49%). Alfa Costruzioni Mecchaniche SpA owns 80% of Omega SRL (in liquidation).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 7

I. The Ninth Circuit's Adoption Of A Negligence Standard For Liability Under Section 19(a)(2) Of The Federal Trade Commission Act Creates An Acute Need For Clarification Since The Standard Sharply Conflicts With That Applied In All Reported Decisions Interpreting The Statute ... 9

II. The Ninth Circuit's Unprecedented Construction Of The Consumer Redress Provisions Of Section 19(a)(2) Of The Federal Trade Commission Act, Which Allows The Commission To Obtain Summary Judgment Without Establishing Knowing Or Reckless Conduct, Defies The Language And Intent Of The Statute And Leaves The Application Of The Statute In A State Of Confusion 17

III. The Ninth Circuit's Affirmance Of The District Court's Summary Judgment, Which Requires Figgie To Pay Up To $49,950,000 As Consumer Redress Without Any Evidence Of Actual Consumer Reliance Or Injury, Constitutes A Particularly Egregious Departure From Accepted Judicial Proceedings 21

CONCLUSION 27

APPENDIX A-1

TABLE OF AUTHORITIES

Page

CASES

Ernst & Ernst v. Hochfelder, 425 U.S. 185, 47 L.Ed.2d 668, 96 S.Ct. 1375, *reh'g denied*, 425 U.S. 986, 48 L.Ed.2d 811, 96 S.Ct. 2194 (1976) 9

Federal Trade Commission v. AMREP Corp., 705 F.Supp. 119 (S.D.N.Y. 1988), *vacated in part, appeal denied, on recons., FTC v. AMREP Corp.*, 1990 U.S. Dist. LEXIS 418 (S.D.N.Y. January 18, 1990) 13, 19, 21, 23, 25-26

Federal Trade Commission v. Amy Travel, 875 F.2d 564 (7th Cir. 1989), *cert. denied, Amy Travel Services, Inc. v. FTC*, 493 U.S. 954, 107 L.Ed.2d 352, 110 S.Ct. 366 (1989) 11

Federal Trade Commission v. Colgate Palmolive Co., 380 U.S. 374, 85 S.Ct. 1035, 13 L.Ed.2d 904 (1965) 18

Federal Trade Commission v. Glenn W. Turner, 1983-1 Trade Cas. (CCH) ¶ 65,244 (M.D. Fla.1982) [1982 WL 1947] 12

Federal Trade Commission v. MacMillan, Inc., 1983-2 Trade Cas. (CCH) ¶ 65,553 (M.D. Fla. 1982) 12, 13

Federal Trade Commission v. Turner, 609 F.2d 743 (5th Cir. 1980) 18

Figgie International, Inc. v. FTC, 817 F.2d 102 (4th Cir. 1987) 4

Hollinger v. Titan Capital Corp., 914 F.2d 1564 (9th Cir. 1990), amended, *reh'g denied*, 1990 U.S. App. LEXIS 1982 (9th Cir. Nov. 13, 1990), *cert. denied, Titan Capital Corp. v. Hollinger*, ___ U.S. ___, 113 L.Ed.2d 719, 111 S.Ct. 1621 (1991) 10

TABLE OF AUTHORITIES – Continued

Page

Mansbach v. Prescott, Ball & Turben, 598 F.2d 1017 (1979), *disapproved on other grounds, Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 84 L.Ed.2d 158, 105 S.Ct. 1238 (1985) 10, 11, 16

Rolf v. Blyth, Eastman Dillon & Co., Inc., 570 F.2d 38 (2nd Cir. 1978) 10

STATUTES

Section 5, Federal Trade Commission Act, 15 U.S.C. § 45 ..... *passim*

Section 5(a), Federal Trade Commission Act, 15 U.S.C. § 45(a) 2, 4

Section 5(b), Federal Trade Commission Act, 15 U.S.C. § 45(b) 2

Section 13, Federal Trade Commission Act, 15 U.S.C. § 53 11

Section 13(a), Federal Trade Commission Act, 15 U.S.C. § 53(a) 2

Section 13(b), Federal Trade Commission Act, 15 U.S.C. § 53(b) 2

Section 19, Federal Trade Commission Act, 15 U.S.C. § 57b ..... *passim*

Section 19(a)(2), Federal Trade Commission Act, 15 U.S.C. § 57b(a)(2) ..... *passim*

Section 19(c)(1), Federal Trade Commission Act, 15 U.S.C. § 57b(c)(1) 6, 17, 22

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 2

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 1337(a) 2

28 U.S.C. § 1345 2

MISCELLANEOUS

Kanwit, Federal Trade Commission: Regulatory Manual, § 21.03, pp. 21-10 to 21-14 (ed. 1979; 1993 Supp.) 19, 20

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FEDERAL TRADE COMMISSION,

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Petition For Writ Of Certiorari To The Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Figgie International, Inc., prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered on May 7, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 994 F.2d 595 and is reprinted in the Appendix, A-1 to A-30.

The United States District Court for the Central District of California issued no opinions in this case. Its orders are reprinted in the Appendix, A-31 to A-55.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. §§ 1331, 1337(a), 1345, and 15 U.S.C. § 57b(a)(2),(b), respondent Federal Trade Commission brought this suit in the Central District of California. After granting summary judgments as to liability and damages, the court entered judgment on January 17, 1991. On petitioner's appeal, the Ninth Circuit entered judgment on May 7, 1993, affirming the judgment below, and petitioner's timely petition for rehearing and suggestion for rehearing *en banc* was denied on August 6, 1993. A-214. This petition for writ of certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 5(a) and (b) of the Federal Trade Commission Act, 15 U.S.C. § 45(a) and (b); Section 13(a) and (b) of the Federal Trade Commission Act, 15 U.S.C. § 53(a) and (b); and Section 19 of the Federal Trade Commission Act, 15 U.S.C. § 57b are set forth in the Appendix, A-215 to A-224.

STATEMENT OF THE CASE

During the period from 1980 through 1987, Figgie International, Inc. ("Figgie"), an Ohio corporation, marketed two types of residential fire warning devices under its Vanguard trade name: smoke detectors and heat detectors. Figgie has never sold heat detectors or smoke detectors to end users or consumers; it sells only to distributors. Figgie's distributors are free to sell to whomever they desire and to set the price on the product. Although Figgie provides promotional materials to its distributors, the distributors are not required to use Figgie's materials and are, in fact, free to use whatever materials they choose.

Figgie's promotional materials contain performance claims for both the Vanguard smoke detectors and heat detectors. It is the representations pertaining to heat detectors which the Federal Trade Commission ("Commission") challenged in the subject litigation. Significantly, most of the materials produced and disseminated by Figgie strongly advocate a *combined* system of both smoke detectors and heat detectors as the most effective way to provide complete and sure fire protection. Comm'n, A-164 to A-165, A-169 to A-170; ALJ, ¶¶ 53i-j, 57c-d, A-82 to A-83, A-89, A-103 to A-104.[1] Figgie's promotional materials did not at any time represent that heat detectors *alone* would provide necessary warning to allow

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[1] "Comm'n refers to the decision of the Commission, Appendix at A-158 to A-213. "ALJ" refers to the initial decision of Administrative Law Judge, Montgomery K. Hyun, Appendix at A-59 to A-158.

occupants safe escape in the event of most fires. ALJ, ¶ 73c, A-101.

On May 17, 1983, the Commission issued an administrative complaint, charging Figgie with violating Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45, "FTC Act") which prohibits any person or entity from using any "unfair or deceptive act or practice in or affecting commerce." A-215. In an order dated April 11, 1986, the Commission concluded that Figgie had made two representations which constituted "deceptive acts or practices" in violation of Section 5(a) and ordered Figgie to cease and desist from making the two representations or misrepresenting the performance characteristics of its heat detectors.[2]

Significantly, during the administrative proceedings, the Commission called no consumers to testify as to whether either of the two representations had actually been made to them; whether such representations, if made, had affected their purchase; or whether they would have purchased the Vanguard products without the subject representations. Instead, the Commission

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[2] The Commission determined that Figgie *impliedly* represented ("consumers reasonably would have interpreted" [Comm'n, A-167]) that the Vanguard heat detectors provide the necessary warning to allow safe escape in most residential fires, and that its combined system of heat and smoke detectors provides significantly greater fire warning protection than smoke detectors alone because heat detectors respond more quickly than smoke detectors to hot, flaming fires. The Fourth Circuit Court of Appeals affirmed the Commission's cease and desist order. *Figgie International, Inc. v. FTC*, 817 F.2d 102 (4th Cir. 1987).

relied entirely on the testimony of a Dr. Joel Cohen, an expert in consumer behavior and "impression formation" to describe the "meaning and effect" of Figgie's advertising and promotional representations. ALJ, A-99. According to Dr. Cohen, the materials he reviewed contributed to a "net impression" supporting the allegations made by the Commission, and it would be a "waste of taxpayer's [sic] money" to determine if, in fact, the materials he reviewed conveyed the alleged claims to consumers. ALJ, A-101.

On July 18, 1988, the Commission filed the complaint in this action, seeking "consumer redress" under Section 19(a)(2) of the FTC Act (15 U.S.C. § 57b(a)(2)) on behalf of unidentified consumers who had purchased Vanguard heat detectors during the period from May 17, 1980, to July 10, 1987. This provision of the Act, adopted in 1975, allows the Commission, following issuance of a cease and desist order, to commence a civil action to redress injury to consumers,

> "[i]f the Commission satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent . . . "

The Commission's complaint paraphrased the two representations prohibited by the cease and desist order and alleged on information and belief that "[t]he acts or practices are such that a reasonable man would have known under the circumstances are dishonest or fraudulent." [sic]

Two and one-half years later, on January 17, 1991, without having conducted a trial on the material factual

issues unique to the Section 19 proceeding, the trial court, in an unprecedented three-step procedure, entered judgment against Figgie in an amount "which may not exceed" $49,950,000. A-55.

Step One (March 15, 1989): The court granted the Commission's motion that 46 statements, selectively extracted from the 193 factual findings of the ALJ and the 25-page opinion of the Commission, be deemed conclusive pursuant to Section 19(c)(1) (15 U.S.C. § 57b(c)(1)). A-31 to A-40. At the same time, the court refused to deem conclusive additional findings made by the ALJ and the Commission which were material to establishing the nature of Figgie's acts and practices, its good faith, and its lack of liability for consumer redress.

Step Two (February 9, 1990): The court granted summary judgment on the issue of Figgie's liability for consumer redress under Section 19(a)(2), relying *solely* on 42 of the 46 abbreviated findings earlier deemed conclusive. A-49. The court concluded, as a matter of law, based only on the findings made in the Section 5 administrative proceeding, that "[a] reasonable man under the circumstances would have known that [the two representations at issue] were dishonest or fraudulent." A-47 to A-48.

Step Three (January 14, 1991): The court granted the Commission's motion for summary judgment as to the amount of redress, entering judgment for a *minimum* of $7,590,000 and a *maximum* of $49,950,000. A-54 to A-55. The only evidence the Commission introduced in support of its motion was 35 declarations of consumers who had purchased one or more of the 293,824 Vanguard heat detectors sold between May 17, 1980, and July 20, 1987,

and declarations from two attorneys and a salesman who had worked for a distributor. Not one of the consumer declarants stated he or she had been misled or injured by either of the two subject representations.

Figgie timely appealed to the Ninth Circuit Court of Appeals. In its decision issued May 7, 1993, the court upheld the trial court's unsubstantiated conclusion that a reasonable person would have known under the circumstances that the representations were dishonest or fraudulent, affirming the award for a maximum consumer redress of $49,950,000.[3]

REASONS FOR GRANTING THE WRIT

The Congress established fundamentally different objectives and evidentiary burdens under Sections 5 and 19 of the FTC Act. Those differences have, for nearly two decades, protected businesses from staggeringly large monetary judgments in cases where the Commission has failed to carry its burden under the "dishonest or fraudulent" test of Section 19. The lower court's decision in this case obscures the salient distinctions between the two proceedings and hands the Commission a weapon which it can use to evade the statutory burden imposed by the Congress.

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[3] The appellate court ordered the trial court to modify the part of its order which required unclaimed monies deposited by Figgie in a "redress fund" in an amount of $7,590,000 to be used for corrective advertisements or donations to non-profit fire safety organizations ("indirect redress").

In affirming the trial court's conclusion of law that a reasonable person would have known under the circumstances that Figgie's acts were dishonest or fraudulent, the Ninth Circuit has disregarded the significant distinctions between Section 5 and Section 19 proceedings, adopting a standard which departs dramatically from that applied by virtually all of the courts which have addressed liability issues in a consumer redress action under Section 19(a)(2). While the court correctly rejects a "specific intent" standard requiring *actual* knowledge,[4] and accurately concludes that the Section 19 standard is "objective, not subjective" (A-15), it has clearly erred by applying what amounts to a negligence standard. By reading out of Section 19(a)(2) the words "dishonest or fraudulent," and disregarding their significance within the totality of the statute, the court strays far afield from what the Congress intended. As a result of the court's adoption of this plainly erroneous standard, courts may now "make the ultimate determination" required for Section 19 liability by merely considering evidence introduced in a Section 5 proceeding. A-15.

The Ninth Circuit's affirmance of the district court's remedy is equally unsound. The court has, in effect, ruled that in a Section 19 consumer redress action, the Commission need prove neither actual consumer reliance nor actual consumer injury. Having found reliance, without any evidence having been introduced, the court upholds

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[4] Contrary to what the court states (A-14), Figgie did not, and does not, contend that liability under Section 19 requires either evidence of subjective intent or actual knowledge.

the granting of a summary judgment which requires Figgie to "refund" the full retail purchase price paid to all of the distributors by *every* consumer, even though there has been no testimony, at any level of the proceedings, that *any* consumer was actually misled or injured by the representations attributed to Figgie.

As a result of the Ninth Circuit's decision, courts can now find liability to exist where representations have been made innocently or negligently; defendants can face liability with no right to assert defenses which Congress intended to make available; and the Commission can wield a new power never envisioned by the statute. Based upon the lower court's decision, the Commission may seek, and most likely obtain, consumer redress every time it issues a cease and desist order based upon an unfair or deceptive practice which is likely to mislead consumers. The decision has far reaching implications which deserve the attention of this Court.

I. The Ninth Circuit's Adoption Of A Negligence Standard For Liability Under Section 19(a)(2) Of The Federal Trade Commission Act Creates An Acute Need For Clarification Since The Standard Sharply Conflicts With That Applied In All Reported Decisions Interpreting The Statute

This Court determined in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 47 L.Ed.2d 668, 96 S.Ct. 1375, *reh'g denied*, 425 U.S. 986, 48 L.Ed.2d 811, 96 S.Ct. 2194 (1976), that negligence was an insufficient basis for Rule 10b-5 liability under the securities laws. Petitioner is asking the Court to make a similar determination here. Clearly, the Commission is NOT required under Section 19(a)(2) to

demonstrate the defendant's actual *intent* to defraud, nor actual *knowledge* that the acts and practices were dishonest or fraudulent; rather, it is compelled to establish that the conduct of the defendant was, at least, *reckless.* This degree of fault, which imposes a standard which "falls somewhere between intent and negligence" [*Mansbach v. Prescott, Ball & Turben,* 598 F.2d 1017, 1025, n. 36 (6th Cir. 1979), *disapproved on other grounds, Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 84 L.Ed.2d 158, 105 S.Ct. 1238 (1985)], is consistent with the interpretation of the statute adopted by virtually all courts which have previously addressed the question.

The definition of "reckless" borrowed from securities cases is appropriate in this context:

> "Reckless conduct is, at the least, conduct which is 'highly unreasonable' and which represents 'an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it."

Rolf v. Blyth, Eastman Dillon & Co., Inc., 570 F.2d 38, 47 (2nd Cir. 1978). The identical definition has been applied by other circuits: *Hollinger v. Titan Capital Corp.,* 914 F.2d 1564, 1569 (9th Cir. 1990); *Mansbach v. Prescott, Ball & Turben, supra,* at 1025.

The difficulty in interpretation appears to stem from the statutory language which employs terms associated with both negligence ("reasonable person would know") and intentional conduct ("dishonest and fraudulent"). Recklessness, which has been characterized as a "surrogate for fraud" (*Rolf v. Blyth, Eastman Dillon & Co., Inc.,*

supra, at 46) reconciles both terms because it does not require a *subjective* showing of actual intent, but provides for the "functional equivalent" of intent because it measures conduct against an external standard.

This test, which applies an objective rather than subjective standard, has been applied by the courts in both securities cases and FTC injunction cases under Section 13 of the FTC Act because "[r]equiring a plaintiff to show that the defendant acted with *actual subjective intent* to defraud could impose a great burden upon recovery, greatly limiting the . . . claim." *Mansbach v. Prescott, Ball & Turben, supra,* at 1025; *Federal Trade Commission v. Amy Travel,* 875 F.2d 564, 574 (7th Cir. 1989), *cert. denied, Amy Travel Services, Inc. v. Federal Trade Commission,* 493 U.S. 954, 107 L.Ed.2d 352, 110 S.Ct. 366 (1989).

Under the foregoing definition, the conduct must consist of an extreme departure from ordinary care and either be known, or so obvious, that the defendant would necessarily have been aware of it. The language of the statute, "a reasonable man would have known . . . " constitutes a recklessness standard:

> "The seventh circuit there held that recklessness was highly unreasonable conduct which is an extreme departure from the standards of ordinary care. While the danger need not be known, *it must at least be so obvious that any reasonable man would have known of it.*"

Mansbach v. Prescott, Ball & Turben, supra, at 1025; emphasis added. Significantly, until now, *all* of the courts which have interpreted the language of section 19 have applied a recklessness standard.

In *Federal Trade Commission v. Glenn W. Turner,* 1983-1 Trade Cas. (CCH) ¶ 65,244 (M.D. Fla.1992) [1982 WL 1947], the court determined that the defendant's conduct in setting up pyramid marketing schemes, fabricating success stories, and misrepresenting sales and product availability, was sufficient to impose liability under Section 19. The court concluded:

> "Acts which are fraudulent or dishonest for purposes of consumer redress should fall at least within the scope of the activities which would be deemed fraudulent for purposes of the mail fraud statute. 18 U.S.C. Section 1341. Acts within the purview of that statute need only be reasonably calculated to deceive persons of ordinary prudence and comprehension."

1983-1 Trade Cas. ¶ 65,244, at p. 69,451.

Two years later, in *Federal Trade Commission v. MacMillan, Inc.,* 1983-2 Trade Cas. (CCH) ¶ 65,553 (M.D. Fla. 1982), the court employed the *Glenn Turner* standard, equating the words "reasonable man would have known" with the words of the mail fraud statute, "reasonably calculated to deceive." While acknowledging that the language of the statute does not require proof of a defendant's actual intent to defraud consumers, it held that the determination required by the statute did require a review of the acts and practices engaged in, the intent with which the defendant engaged in the acts and practices, and all of the circumstances surrounding the acts and practices. The court found the defendant's "innocent intentions" and conduct "inconsistent with any intent to defraud" precluded a finding of liability under Section 19.

Finally, in the last reported case, decided in 1988, the court found that even though the defendant had engaged in

a land fraud scheme, summary judgment had to be denied because the Commission had not shown that the findings from the Section 5 action entitled it to summary judgment on the issue of liability: "[t]he defendant must have had the specific intent to defraud, or at least engaged in conduct 'reasonably calculated to deceive persons of ordinary prudence and comprehension,' " citing *FTC v. MacMillan, Inc., supra,* at ¶ 68,757. *Federal Trade Commission v. AMREP Corp.,* 705 F.Supp. 119, 127 (S.D.N.Y. 1988), *vacated in part, appeal denied, on recons. FTC v. AMREP Corp.,* 1990 U.S. Dist. LEXIS 418 (S.D.N.Y., January 18, 1990). The court concluded that "the differing standards of liability under Section 5 and Section 19 prevent a finding of liability against AMREP based on the Section 5 proceeding."

In contrast, the district and circuit courts in this case did precisely what each of the earlier reported cases said could not be done: grant a summary judgment based *solely* on findings which had been made in the Section 5 proceedings, proceedings in which neither the state of mind nor the knowledge of the defendant was material. Each of the lower courts in the above-described cases acknowledged that the defendant's state of mind (or good faith) was a material, if not crucial, element in Section 19 liability. The courts also acknowledged that evidence on those issues would be excluded in the Section 5 action. *AMREP, supra,* at 127. Yet, in the present case, the court below entered judgment on liability based only on 42 findings paraphrased from the Section 5 findings of the ALJ and the Commission, without ever conducting a trial and receiving evidence on issues uniquely applicable to the Section 19 proceedings.

The court below concedes that the declarations of Figgie's Vice President-Marketing establish, for purposes

of summary judgment, that he was "innocent of any dishonest intentions," yet, incredulously, it finds that fact to be irrelevant because "the issue of law is what a reasonable person would have known, not what Figgie's executive knew." A-15. Based upon that erroneous premise, the court concludes that the district court was only required to make an "ultimate determination" that a "reasonable person would know that [Figgie's] practices were dishonest or fraudulent." *Id.*

The circuit court cites three facts as a basis for supporting the district court's determination on the state of mind issue: (1) Figgie sold its product to the public based upon misrepresentations; (2) it misled customers about "the most useful piece of information" they could have used; and (3) it failed to warn that in most instances the warning from heat detectors would come too late to save lives. A-15 to A-16. Although each of these actions could well have been carried out negligently, the court concludes that a reasonable person in Figgie's position would have known that the representations were dishonest or fraudulent because Figgie had access to certain "scientific data."

The "scientific data" referred to in the administrative proceeding, however, was far from settled. The following findings from the administrative proceedings, at a minimum, raise a triable issue as to Figgie's state of mind and/or good faith, both of which are relevant considerations in a Section 19 case:

- There is *no unanimity among experts* regarding where "tenability limits" should be set for

heat, smoke obscuration, and carbon monoxide levels. ALJ, A-114.[5]

- In four tests conducted in October 1983 by the San Francisco Fire Department, heat detectors activated before the sprinkler system in all four tests. ALJ, ¶ 163, A-133.

- "Fire science" is an evolving discipline and "fire test methodology may be further refined as scientific knowledge regarding the behavior of fire and related chemical and physiological factors expands in the future." ALJ, A-147.

- The "new consensus regarding the limitations of heat detectors as a residential fire alarm device is not entirely free of thoughtful dissent." *Id.*

- The 1980 edition of the National Fire Protection Association ("NFPA") Standard 74 includes the following language: "It is recommended that the householder consider the use of additional smoke or heat detectors for increased protection for those areas separated by a door from the areas protected by the required smoke detectors under 2-1.1.1 above. The recommended additional areas are: living room, dining room, bedroom(s), kitchen, attic (finished or unfinished), furnace room, utility room, basement, integral

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[5] Tenability limits are supposed to represent the point at which the buildup of heat, smoke, and carbon monoxide gas within a room has reach hazardous levels (ALJ, ¶ 106, A-114) and served as the primary basis for the test results upon which the Commission's experts relied.

> or attached garage and hallways not covered under 2-1.1.1 above." ALJ, A-137.

Significantly, the Commission did not produce any evidence in the Section 5 proceeding of a single instance in which a Vanguard heat detector, in fact, failed to give the necessary warning to allow the occupants to escape safely in an actual residential fire. Indeed, all of the experts on both sides testified that they were "unaware of any such instance." Comm'n. A-181.

The Commission determined in the Section 5 proceeding only that Figgie's promotional materials were "likely to mislead" consumers. ALJ, A-153; Comm'n, A-162. Based upon this Section 5 determination, it was not possible for the court to correctly apply the Section 19 "dishonest or fraudulent" standard without taking additional evidence to determine if Figgie had knowledge that its representations were false, if it was recklessly indifferent to the truth or falsity of its representations, or if it intentionally avoided the truth. These are issues of fact which have never been determined. Since "what constitutes reckless behavior . . . is ultimately a *factual determination* which will necessarily vary from case to case" [*Mansbach v. Prescott, Ball & Turben, supra,* at 1025], Figgie was at least entitled to a trial under the statute.

II. The Ninth Circuit's Unprecedented Construction Of The Consumer Redress Provisions Of Section 19(a)(2), Which Allows The Commission To Obtain Summary Judgment Without Establishing Knowing Or Reckless Conduct, Defies The Language And Intent Of The Statute And Leaves The Application Of The Statute In A State Of Confusion

The Congress has drawn sharp distinctions between proceedings initiated under Sections 5 and 19 of the FTC Act, distinctions which the Ninth Circuit's decision obliterates. The provisions are characterized by notably distinct objectives, fundamentally different roles for the Commission, clearly distinguishable issues and evidentiary burdens, and significantly contrasting procedures. The Ninth Circuit's failure to preserve the significant distinctions between the two provisions undermines the bifurcated procedure for consumer redress envisioned by the Congress.

First, the Congress has prescribed different objectives for the two provisions. In the Section 5 proceeding, the Commission's role is to determine if a respondent has engaged in "unfair or deceptive acts or practices" and, if so, to issue a cease and desist order to preclude continuation of the practices. The findings of the Commission as to material facts, "with respect to the act or practice" shall, with two exceptions, be conclusive in a Section 19 proceeding. Section 19(c)(1).

In contrast, the Section 19 proceeding is intended to determine whether or not consumer redress is appropriate. It is in this proceeding, not the Section 5 proceeding, that a *court* determines the extent of injury to the public, the relief appropriate to redress the injury, and whether

or not the Commission has carried its burden of demonstrating that a reasonable person "would have known under the circumstances [that the act or practice] was dishonest or fraudulent."

The role of the Commission is significantly different in the two proceedings. The Commission has an influential role in interpreting Section 5, and its judgment is given great weight because Section 5 violations rest "so heavily on inference and pragmatic judgment." *F.T.C. v. Colgate Palmolive Co.*, 380 U.S. 374, 385, 13 L.Ed.2d 904, 914, 85 S.Ct. 1035 (1965). When bringing a consumer redress action for damages under Section 19, however,

> "the FTC assumes a different litigative posture than the one it occupies in performing its administrative and quasi-judicial functions. In cases brought under 15 U.S.C. Section 57b(a)(2), the FTC is a civil plaintiff seeking damages to redress the injuries of *individual* consumers rather than a watchdog protecting the general public from unfair trade practices."

Federal Trade Commission v. Turner, 609 F.2d 743, 745 (5th Cir. 1980). In the civil action, the Commission must carry its burden of showing that a reasonable person would have known that his or her acts or practices were dishonest or fraudulent.

At the time of enactment of Section 19, Charles A. Tobin, Secretary of the FTC, complained that "[w]e would emphatically prefer to see the authority for consumer redress vested in the Commission. Accordingly, we suggest that the Federal Trade Commission Act be amended to authorize the Commission to order such consumer redress as may be necessary to remedy the effects of

violations of Commission orders." Letter to Honorable Harley O. Staggers, Chairman, Committee on Interstate and Foreign Commerce, House of Representatives, from Charles A. Tobin, Secretary of the Commission, 93d Cong., 2d Sess. (1974), reprinted in [1974] U.S. Code Cong. & Ad. News, 7740, 7744. The Congress' rejection of Secretary Tobin's suggestion demonstrates its determination that the two proceedings not be fused, but remain distinct.

The issues adjudicated in the two proceedings are substantially different, too. Section 5 permits the Commission to issue a cease and desist order following the conclusion of its own administrative proceedings whenever it "shall be of the opinion" that an act or practice is "unfair or deceptive." Under Section 5, the respondent's state of mind is irrelevant; the statute requires only that the respondent's acts or practices have "the tendency or capacity to mislead." *AMREP, supra,* at 127.

When the Commission initiates a civil action in a district court to obtain an order for consumer redress, however, it must "satisf[y] the court that the act or practice to which the cease and desist order relates is one which a reasonable man *would have known* under the circumstances was *dishonest or fraudulent.*"[6] Although it was not the intent of Congress to require the court, in

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[6] Dishonest is similar to unfairness with the added requirement that a respondent be *aware* of the wrongfulness of his act; fraudulent requires false representations which a reasonable person knows are false or are at least reasonably calculated to deceive. Kanwit, Federal Trade Commission: Regulatory Manual, § 21.03, pp. 21-10 to 21-14. (ed. 1979; 1993 Supp.)

applying the statutory standard, to find "that a reasonable man under the circumstances would have considered such act or practice to be *criminal*" [S. Conf. Rep. No. 93-1408, 93d Cong., 2d Sess. (1974) reprinted in [1974], U.S. Code Cong. & Ad. News 7755, 7773], the very language of the statute, being couched in terms of dishonesty or fraud, puts intent or state of mind of the respondent at issue; liability cannot be based on mere misrepresentations or failure to disclose:

> "In consumer redress cases not involving rule violations, the Commission must be able to prove that the actual practice involved 'fraud or dishonesty,' which a state or federal court judge may interpret as more closely approaching common law fraud rather than 'unfairness' under Section 5 of the FTCA. The agency will probably concentrate in the redress area on bringing cases where fraud is evident or dishonesty is manifest under the 'reasonable man' test."

Kanwit, Federal Trade Commission: Regulatory Manual, § 21.04, pp. 21-15 to 21-16.

Because the issues are different in the two proceedings, the evidentiary burdens and discovery allowed are noticeably different. Knowledge, for example, is not an issue in a Section 5 case. Accordingly, "the Commission will not admit evidence bearing on the 'dishonest or fraudulent' standard since that issue is decided by the reviewing court." Kanwit, *supra*, § 21.05, p. 21-19. In contrast, knowledge is highly material in a Section 19 case since the Commission must attempt to prove that the defendant "would have known under the circumstances" that the conduct was dishonest or fraudulent. Similarly,

discovery and proof of facts relating solely to Section 19 issues are not permitted in Section 5 proceedings. *Id.*, § 21.07, p. 21-23. And, the Commission's policy even precludes discovery directed to the Section 19 issues once a complaint is issued in a Section 5 case. *Id.*

Given the disparate functions the Congress assigned to the two statutory proceedings, and given the limitations the Commission has imposed in the Section 5 proceedings, it is incongruous for a court to enter a summary judgment on the issue of liability in a Section 19 proceeding based solely on the Section 5 findings, thereby allowing the Commission to evade its burden of establishing that the "dishonest or fraudulent" standard has been met.

III. The Ninth Circuit's Affirmance Of The District Court's Summary Judgment, Which Requires Figgie To Pay Up To $49,950,000 As Consumer Redress Without Any Evidence Of Actual Consumer Reliance Or Injury, Constitutes A Particularly Egregious Departure From Accepted Judicial Proceedings

In a Section 5 proceeding, a finding of *potential* harm will justify a cease and desist order: "It requires only that the act or practice had the tendency or capacity to mislead." *Federal Trade Commission v. AMREP, supra,* at 127. In other words, "there must be a representation, omission, or other practice *likely to mislead* consumers." Comm'n, A-162. The Commission need not prove *actual* reliance; *potential* reliance is sufficient. Moreover, it need not prove *actual* injury; *potential* injury is sufficient. Because the issues of reliance and injury are not material in a Section

5 case, the Commission called no consumers to testify in the administrative proceedings below.

Under Section 19(c)(1), facts which are material to the Section 5 proceeding, "with respect to . . . [the] act or practice shall be conclusive" unless the findings provide otherwise. Since, however, the issues of reliance and injury are not material to the Section 5 proceedings, facts determined by the Commission cannot be dispositive on those issues. Yet, the court below deemed the findings of the Commission not only to be conclusive, but to be dispositive on issues which were not even material in the Section 5 proceedings.

In order to prevail in its Section 19 proceeding for consumer redress, the Commission had the burden of proving actual consumer reliance. The circuit court, however, concluded that a presumption of actual reliance arises, and the burden shifts to the defendant to prove the absence of reliance, once the Commission has proved "that the defendant made material misrepresentations, that they were widely disseminated, and that consumers purchased the defendant's product." A-21.

The burden shifting rule may be justified where there is a material *omission* which would be likely to have the same effect on all purchasers, or where an affirmative, material misrepresentation was communicated to all purchasers alike. In such cases, it can safely be assumed that all purchasers were likely to have been misled if a representative number of them say they were. But this rationale has no application under the circumstances of this case where the representations deemed to be misleading were, for the most part, implied, and where there was no

uniform method of disseminating Figgie's written sales materials to everyone who purchased the heat detectors.[7]

Figgie's method of disseminating promotional materials is comparable to that discussed by the district court in *Federal Trade Commission v. AMREP, supra:*

> "The problem in this case is more acute than in a case where liability is premised on the utilization of a false newspaper ad or prospectus. In such a case, each and every purchaser who responded to the ad or the prospectus would have been a recipient of the same false representation. Here, the false representations were contained in a variety of written and filmed sales materials, as well as in oral presentations at dinner parties that varied from instance to instance. Whether the representations made at the dinner parties were according to a rigid script or whether they varied in any significant degree was not established in the Section 5 action. *As to any particular purchaser on whose behalf the Section 19 action is brought, the findings of the earlier proceeding do not show that he or she was the recipient of false representations.*

705 F.Supp. at 127; emphasis added.

It is beyond dispute that in the Section 5 proceeding the Commission did not produce the sworn testimony of any purchaser who claimed he or she was *actually* misled

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[7] Astonishingly, the Ninth Circuit even stated that Figgie could be liable for "more" than the two representations which were the subject of the cease and desist order and the Commission's complaint. A-13. Applying this interpretation of the statute, a defendant can never anticipate what the Commission will assert as a basis for liability in the Section 19 action.

by either of the representations and would not have bought the heat detectors but for such representations. Nor did the Commission even attempt to fill that void in the Section 19 proceeding. The 35 consumer declarations offered to the district court merely recite that the declarants were shown various promotional materials by salesmen representing various distributors, and that they purchased heat detectors (and in many instances, smoke detectors) for widely varying prices.[8] Significantly, not one of the 35 declarants complained of being misled or injured by either of the two representations at issue.

The court below, like the Commission before it, found "proof of reliance" in the fact that Figgie's sales materials advocated the purchase of four or five heat detectors per smoke detector and that, in fact, matched Figgie's actual sales ratio. ALJ, A-65, A-103, A-105; Comm'n, A-167; Ninth Circuit Opinion at A-5. Figgie's sale of more heat detectors than smoke detectors, however, is entirely consistent with the recommendations of the NFPA's Standard 74 referred to by the ALJ and the court below. ALJ, ¶ 174, A-137; Ninth Circuit Opinion, A-4.[9]

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[8] These declarations showed that the declarants purchased a combined total of 211 heat detectors. That is less than 1/10 of 1% of the 293,824 heat detectors Figgie sold during the redress period.

[9] Chapter 2 of the NFPA Standard 74 makes smoke detectors the only *required* device and specifies, as the *minimum* number, one "in the immediate vicinity of the bedrooms and on each additional story of the family living unit." ALJ, A-137. Thus, in single story residences, only one smoke detector would be needed to meet the minimum requirement in most instances.

Given the factual findings adopted by the Commission in the Section 5 administrative proceedings, it is as likely as not that consumers purchased the Vanguard combination system because they correctly believed that such a system would offer them effective protection from fires. See, *e.g.*, ALJ Finding 186, A-142; Comm'n, A-190 to A-192. Certainly the Section 5 findings, in and of themselves, gave the court no basis for implying consumer reliance.

The lower court's determination of implied injury was equally inconsistent with the language and intent of the statute as persuasively explained by the court in *Federal Trade Commission v. AMREP, supra.* After determining that the differing standards of liability under Section 5 and Section 19 precluded a finding of liability against AMREP based solely on the Section 5 proceedings, the court explained why the same principle applied to a determination of consumer *injury:*

> " . . . to the extent this action seeks damages (or other suitable remedy) as redress for the defrauding of specific customers of AMREP, it calls for adjudication of issues not raised in the Section 5 proceeding. Because the Section 5 proceeding involved no remedy in favor of any purchaser but only a determination that AMREP's sales practices had a capacity to

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In contrast, several heat detectors could properly be installed in most residences since the installation of *smoke* detectors is not normally recommended in certain locations such as the kitchen, dining room, attic, furnace, utility room, basement, and garage. ALJ, A-137; Comm'n, A-189.

> deceive, that action did not establish that particular purchasers were victimized by fraudulent representations. In a Section 19 action, however, *the court may grant relief only as to those individuals who sustained injury as a result of the defendant's deceptive acts and practices.*

Federal Trade Commission v. AMREP, supra, at 128.

The Ninth Circuit, while giving lip service to the need to prove actual injury [" . . . there may be no redress without proof of injury caused by those practices" A-20)], actually held that a "presumption of reliance" could satisfy the injury requirement. A-20 to A-21. Application of this presumption allowed the Commission to obtain a judgment for $49,950,000 without ever having to establish that any purchaser was damaged by the subject representations. Even if it could be assumed that some consumers would feel they overpaid for the heat detectors, it cannot be said that every one of them should get a return of all money paid when no one testified on that issue.

The Section 5 findings indisputably establish that heat detectors have significant value as part of a combined fire warning system: " . . . common sense and experience show that incorporation of heat detectors into a combined smoke-and-heat detector fire warning system can reasonably be expected to provide a significantly increased level of fire warning protection in most residential fires." ALJ, A-135. Since it was the combined smoke-and-heat detector fire warning system which Figgie was promoting, the extent of the injury to those who purchased the combined system of heat detectors and smoke detectors was unquestionably at issue. This unresolved issue of consumer injury, central to the Section 19 action,

necessarily precluded the court from awarding consumer redress for up to $49,950,000 – an amount the Commission contended was the equivalent of the full amount paid to Figgie's distributors by *every* consumer who purchased a Vanguard heat detector during the "redress period" from May 17, 1980 to July 20, 1987.

CONCLUSION

The Petition for Writ of Certiorari should be granted to ensure that the standards applied by the federal courts in Section 19 proceedings are brought into conformance with each other and with the Congressional intent expressed in the statutory language and the legislative history of the provisions.

Respectfully submitted,

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APPENDIX

Page

Opinion of the Court of Appeals for the Ninth Circuit, Reported at 994 F.2d 595 (9th Cir. 1993) ... A-1

Orders of the U.S. District Court, Central District of California

Order Deeming Findings of Commission Conclusive, filed June 13, 1989 ..... A-31

Findings of Fact and Conclusions of Law, filed February 9, 1990 ..... A-41

Order Granting Summary Judgment As To Liability For Redress, filed February 9, 1990 ..... A-49

Order Re Summary Judgment, filed January 14, 1991 ..... A-50

Findings of Fact and Conclusions of Law, filed January 14, 1991..... A-51

Judgment entered January 17, 1991..... A-54

Proceedings Before The Federal Trade Commission

Complaint, filed May 17, 1983 ..... A-56

Initial Decision rendered by Montgomery K. Hyun, Administrative Law Judge, dated October 23, 1984..... A-59

Opinion of the Federal Trade Commission and Order, dated April 11, 1986..... A-158

Order of the Court of Appeals for the Ninth Circuit Denying Petition for Rehearing and Rejecting Suggestion for Rehearing *En Banc*, dated August 6, 1993 ..... A-214

APPENDIX – Continued

Page

STATUTES

Federal Trade Commission Act, Section 5(a) and (b), 15 U.S.C. § 45(a) and (b) A-215

Federal Trade Commission Act, Section 13(a) and (b), 15 U.S.C. § 53(a) and (b) A-219

Federal Trade Commission Act, Section 19, 15 U.S.C. § 57b A-221

FEDERAL TRADE COMMISSION,

Plaintiff-Appellee,

v.

FIGGIE INTERNATIONAL, INC.,

Defendant-Appellant.

No. 91-55367.

United States Court of Appeals,
Ninth Circuit

Argued and Submitted July 7, 1992.

Decided May 7, 1993.

Jack R. White, Hill, Farrer & Burrill, Los Angeles, CA, for defendant-appellant.

David Shonka, Office of Gen. Counsel, F.T.C., Washington, DC, for plaintiff-appellee.

Appeal from the United States District Court for the Central District of California.

Before: FLETCHER, O'SCANNLAIN, and KLEINFELD, Circuit Judges.

PER CURIAM:

Pursuant to Section 5 of the Federal Trade Commission ("FTC") Act, 15 U.S.C. § 45, Figgie International, Inc. ("Figgie") was ordered to cease and desist from the "unfair or deceptive" practices it used to market its Vanguard heat detectors. After the order became final, FTC sought consumer redress under section 19 of the FTC Act, 15 U.S.C. § 57b. The district court granted FTC's motions for summary judgment, finding Figgie liable for "dishonest or fraudulent" practices in its first judgment and

setting the amount of liability at a minimum of $7.59 million and a maximum of $49.95 million (i.e., a range between the amount of Figgie's profits and the full amount spent by consumers) in the second. Figgie appeals both. We affirm as modified.

FACTS

In a Section 19 proceeding, the Commission's findings of material fact in support of its cease and desist order "shall be conclusive." Section 19(c)(1), 15 U.S.C. § 57b(c)(1). Administrative Law Judge Montgomery K. Hyun issued extensive findings on October 23, 1984 ("ALJ") which were adopted in the Commission's final order on April 11, 1986 ("Comm'n"). *Figgie International, Inc.*, 107 FTC 313 (1986), *aff'd*, 817 F.2d 102 (4th Cir.1987) (text in Westlaw). We summarize the findings.

Figgie manufactures and markets heat detectors for home use under the brand name "Vanguard." Unlike smoke detectors, heat detectors are mechanically operated devices requiring no electricity. Each comes equipped with a fuse which melts at a specific temperature: when the fuse melts, the spring-wound alarm sounds. Until the 1970's heat alarms were considered efficacious. Thereafter fire safety experts modified their views and recommended smoke detectors over heat detectors as the preferred safety device for most locations, recognizing that there were several problems with heat detectors as a household fire alarm system. First, most fire fatalities are caused by asphyxiation or smoke inhalation, not burns. ALJ ¶ 100-04. Smoke is therefore the hazard most in need of detection. Second, smoke from

a residential fire will disperse fairly evenly around a room, allowing it to be quickly detected. Heat distributes less evenly, so that a detector not placed directly over a fire may be slow to activate. ALJ ¶ 182. Therefore, detectable quantities of smoke precede detectable levels of heat in nearly all residential fires. ALJ ¶ 101. Third, heat detectors are subject to "thermal lag," which means that the fuse will usually not reach its melting point until after the air surrounding it has become much hotter. ALJ ¶ 113-16.

These limitations were demonstrated in a series of test fires conducted by fire-prevention experts in the mid-1970's. In almost all test fires, heat detectors sounded their alarms several minutes later than smoke detectors did. Furthermore, heat detectors usually did not sound until after "tenability limits" (levels of smoke, fumes, heat or other hazardous conditions making escape difficult) had been reached. For example, in the "Indiana Dunes I" tests, thermocouple-style heat detectors did not sound at all in 14 out of 37 test fires. On average, the heat detectors sounded 2.2 minutes after tenability limits had been reached, whereas smoke detectors on average sounded 18.6 minutes beforehand. ALJ ¶ 133. The "Indiana Dunes II" tests used Vanguard heat detectors supplied by Figgie; their reaction time was "considerably slower" than the thermocouples. ALJ ¶ 135. In the "Cal Chiefs" test, in only 8% of the fires did a heat detector sound before tenability limits were reached, and in only 4% did the heat detector provide two or more minutes warning. ALJ ¶ 147.

The Vanguard heat detector first came on the market in 1959. For many years, the National Fire Prevention

Association recommended both smoke and heat detectors as part of a household fire warning system. However, following the tests just described, the NFPA changed its standards. The standard adopted in 1978 required at a minimum that smoke detectors be installed on each level of the home and outside each sleeping area. ALJ ¶ 172. The only mention of heat detectors was in the following footnote:

> The provisions of 2-1.1.1 represent the minimum number of detectors required by this standard. It is recommended that the householder consider the use of additional smoke or heat detectors for increased protection for those areas separated by a door from the areas protected by the required smoke detectors under 2-1.1.1 above. . . . However, the use of additional detectors remains the option of the householder.

ALJ ¶ 174.

Figgie knew of the results of the Indian Dunes and Cal Chiefs tests and knew of the changes in the NFPA standards. However, its representations[1] to consumers during the 1980's did not reflect them. The crux of Figgie's message was that heat detectors could be relied on

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[1] Figgie sold its Vanguard brand heat detectors (which it manufactured) and smoke detectors (which it purchased from another manufacturer) to distributors who then sold to the public. However, Figgie exercised "substantial control" over the way Vanguard heat detectors were marketed, "including the content of the sales presentation." ALJ ¶ 21. Figgie prepared the slide-tape show that was the centerpiece of each sales pitch, as well as brochures, pamphlets and other sales paraphernalia. Figgie trained its distributors and encouraged them to conform their practices to its two-volume sales manual. ALJ ¶ 25-27.

as life-saving fire warning devices, and that the best protection for one's home is a combination of four or five heat detectors to one smoke detector. The ALJ's decision provides a thorough description of Figgie's promotional materials. ALJ ¶ 35-65. He concluded that "every one of them clearly conveys" the claim that Vanguard heat detectors provide the necessary warning to allow safe escape from a residential fire. ALJ ¶ 76. Similarly, "Virtually all of the promotional materials . . . contain express and implied claims that the combination system combining Vanguard heat and smoke detectors significantly increase the level of fire warning protection than smoke detectors alone." ALJ ¶ 78. For example, one of Figgie's promotional pieces was styled as a "red-letter news release bulletin" with the headline "HEAT DETECTORS HAVE PROBABLY SAVED MORE LIVES AND PROPERTY THAN ANY OTHER FIRE DETECTION DEVICE." ALJ ¶ 50. Figgie's slide-tape show included a testimonial from a customer who said, "to have adequate protection the home must have heat detectors as well as smoke detector[s]." ALJ ¶ 40. One of Figgie's brochures discusses the NFPA standards "in such a way as to leave the reader with a distinct impression that [the NFPA] regards both smoke detectors and heat detectors equally effective." ALJ ¶ 82.

Figgie sold it products to the public through at-home sales visits by distributors. This sales technique "heightened the impact of the materials because the captive consumer's attention is focussed for the duration of the sales presentation." ALJ ¶ 84. In addition to the slide-tape shows, a sales presentation would often include a demonstration using a cardboard house with a tissue paper roof.

The salesperson would place a lit candle inside the house while holding a heat detector directly over the tissue. The heat detector would alarm before the paper scorched. ALJ ¶ 62. This dramatic and seemingly informative demonstration was in fact misleading. The cardboard house channelled hot air from the candle directly to the fuse, a situation that would be "completely fortuitous" under actual fire conditions. Also, given that the ignition temperature of paper is 450, the demonstration proved only that a heat detector held inches above a flame will activate sometime before the fuse reaches 450. ALJ ¶ 183. Other forms of sales pressure could also be exerted in the home. Customers who bought less than the recommended number of the more expensive heat detectors were asked to sign a release acknowledging that only "partial fire detection protection" had been purchased. ALJ ¶ 65. Figgie's promotional techniques were very successful: its customers bought four or five heat detectors for every smoke detector. ALJ ¶ 18.

The ALJ concluded that Figgie's representations were misleading and deceptive in the absence of an explanation of the limits of heat detectors and the comparative superiority of smoke detectors. ALJ ¶ 187-88. The ALJ issued an order requiring that Figgie make appropriate disclosures to its customers and avoid all misrepresentations. Specifically, all promotional materials for heat detectors were required to carry the following notice: "CAUTION: In most residential fires dangerous level of smoke, heat and carbon monoxide gas will build up before the heat detector alarm goes off."

On appeal, the Commission upheld most of the ALJ's findings and conclusions, but the warning message was

changed to read as follows: "NOTICE: Smoke detectors give earlier warning than heat detectors in nearly all residential fires. That is because detectable amounts of smoke almost always develop before detectable levels of heat." The Commission explained that "the fact that smoke detectors almost always provide earlier warning than heat detectors would seem to be the single most useful piece of information that can be provided to potential purchasers of residential fire protection systems." Comm'n at 395.

The balance of the Commission's cease and desist order closely tracked the ALJ's order. Figgie may not represent directly or by implication "that heat detectors provide the necessary warning to allow safe escape from most residential fires" or "that fire alarm systems combining heat detectors and smoke detectors provide significantly greater fire warning protection than smoke detectors alone because heat detectors give earlier warning of hot flaming fires." *Id.* at 400. Figgie may not misrepresent "the capability of the heat detector to provide the necessary warning to occupants to allow them to escape safely in the event of fire." *Id.* Figgie's future representations must "rel[y] upon competent and reliable scientific evidence which substantiates such representation." *Id.* Figgie must send warning notices to all identifiable past purchasers of Vanguard heat detectors. *Id.* at 401: Figgie must not continue to do business with distributors who do not conform their practices to the order. *Id.*

The ALJ and the Commission carefully refrained from finding that the sale of heat detectors was in itself a deceptive trade practice. Both acknowledged that heat detectors, when added to the necessary minimum of

smoke detectors, could provide additional protection for two reasons. First, smoke detectors may be prone to false alarms when placed in kitchens, garages, furnace rooms or other areas where occasional smoke is to be expected. Second, batteries in smoke detectors wear out and the electronics within the smoke detector can become dirty or damaged. Mechanical heat detectors require no electricity and are virtually maintenance-free. "Obviously, an operating heat detector provides greater protection than a nonoperating smoke detector." Comm'n at 391. The ALJ concluded that a combined system of smoke and heat detectors, when added to the minimum number of smoke detectors, "can provide increased protection in residential fires." ALJ ¶ 186. The Commission found that while this incremental increase in protection was "marginal at best,"

> [t]hat is not to say, however, that a slightly better level of fire protection is not significant. As used in the complaint, "significant" simply means "important" or "meaningful." Whether a slightly better level of protection is significant may depend on the seriousness of the harm that could result if the protective device failed to operate. Even a very small amount of additional protection from death or serious injury caused by fire would no doubt be considered significant by some customers.

Comm'n at 389.

The Commission's cease and desist order was upheld on appeal. *Figgie Int'l, Inc. v. FTC*, 817 F.2d 102 (4th Cir.1987) (text in Westlaw). FTC then brought the current suit for consumer redress under Section 19 for the period between May 18, 1980 and July 20, 1987. On June 13, 1989,

the district court granted FTC's motion to deem "conclusive" a list of 42 findings of fact distilled from the Section 5 proceeding. On February 9, 1990, the district court concluded that

> A reasonable man under the circumstances would have known that Figgie's representations that a) Vanguard heat detectors provide the necessary warning to allow safe escape in most residential fires, and b) a combined system of heat detectors and smoke detectors provides significantly greater warning than smoke detectors alone because heat detectors give earlier warning of hot, flaming fires were dishonest or fraudulent.

Summary judgment was therefore granted to FTC on the issue of liability.

On January 14, 1991, the district court granted summary judgment on the amount of redress. The court found that Figgie received $7.59 million in gross revenues from sale of Vanguard heat detectors between the relevant dates, and that consumers paid $49.95 million for them (293,824 units @ $170). The court further concluded that "The Vanguard heat detector's value, given the misrepresentations recommended by Figgie and made by distributors to consumers, is de minimis." Therefore the court ordered that Figgie pay $7.59 million into a fund which would refund the full purchase price of Vanguard heat detectors to customers. If aggrieved customers claim less than that amount, the balance is to be used for "indirect redress" in the form of corrective advertising or

donations to non-profit fire safety organizations. If customers claim more, Figgie is to continue to add to the fund as necessary, to a maximum of $49.95 million.

Figgie timely appeals both summary judgment orders.

JURISDICTION

The district court had jurisdiction under Section 19(a)(2) of the FTC Act, 15 U.S.C. § 57b(a)(2), which allows the Commission to bring a civil suit for redress in any district court with personal jurisdiction over the defendant. Although Figgie's headquarters are in Virginia, it does business in the central district of California. Venue is therefore proper.

Pursuant to 28 U.S.C. § 1291 this court has jurisdiction over the district court's final orders granting summary judgment.

DISCUSSION

I. LIABILITY

Section 19(a)(2) of the FTC Act grants the Commission authority to bring a civil suit against any entity which engaged

> in any unfair or deceptive act or practice . . . with respect to which the Commission has issued a final cease and desist order. If the Commission satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known

> under the circumstances was dishonest or fraudulent, the court may grant relief[.]

15 U.S.C. § 57b(a)(2). The cease and desist order, affirmed by the Fourth Circuit, is final. Figgie mounts three challenges to the district court's judgment of liability based on its finding that a reasonable person would have known the act or practice was dishonest and fraudulent under the circumstances. (1) The district court erred in its characterization of the Commission's factual findings. (2) There was no evidence that Figgie had specific intent to defraud. (3) A reasonable person would not know that Figgie's practices were dishonest or fraudulent.

A. Factual Findings

The district court granted summary judgment to the FTC on liability and damages. There has been no trial. We must determine, viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact. *Federal Deposit Ins. Corp. v. O'Melveny & Meyers*, 969 F.2d 744, 747 (9th Cir.1992). Since its cease and desist order became final, *Figgie Int'l, Inc. v. FTC*, 817 F.2d 102 (4th Cir.1987), the findings of the Commission are conclusive. 15 U.S.C. § 57b(c)(1). The Commission made findings independently, and adopted the administrative law judge's decision as its findings and conclusions except where inconsistent with its opinion, *In re Figgie International, Inc.*, 107 FTC 313, 399 (1986). The Commission's findings, and those of the administrative law judge which the Commission adopted, are accordingly treated as established facts for purposes of this decision.

We review the district court's grant of summary judgment de novo. *Intel Corp. v. Hartford Accident and Indemnity Co.*, 952 F.2d 1551, 1556 (9th Cir.1991). The district judge labelled a part of his decision "findings of fact." These were paraphrased from some of the findings of the Commission. Since there was no trial, and no other evidentiary hearing in district court in which findings might be made, the district court's determinations were facts which the district court determined were material and not genuinely at issue. *See* Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); *O'Melveny & Meyers*, 969 F.2d at 747; *cf.* Fed.R.Civ.P. 56(d). To the extent that the district court findings which paraphrase the Commission's findings, are claimed to deviate from the Commission's findings, the Commission's findings control, so we need not resolve appellant's claim that the district court did not paraphrase them correctly and accurately.

Accordingly, our review treats as facts those established by the Commission's findings. To the extent that the Commission adopted the ALJ's findings, we treat those as conclusive as well. Where the district court made findings based upon the affidavits and other materials submitted on summary judgment, we treat them as determinations that, as to those matters, no genuine issue of material fact was established. We view the evidentiary submission in the light most favorable to the non-moving party to determine whether genuine issues of fact remain for trial. *Anderson*, 477 U.S. at 249, 106 S.Ct. at 2510; *O'Melveny & Meyers*, 969 F.2d at 747.

Figgie also mounts two fact-based challenges to the district court's conclusions of law. First, Figgie insists that

the only misrepresentations that could form the basis of liability are the two that appeared in the district court's conclusions of law: misrepresentations to the effect that (a) Vanguard heat detectors provide the necessary warning to allow safe escape in most residential fires, and (b) a combined system of heat detectors and smoke detectors provides significantly greater warning than smoke detectors alone because heat detectors give earlier warning of hot, flaming fires. This is not so. Section 19 premises liability on unfair or deceptive practices that are the subject of a cease and desist order. The Commission's final order encompasses far more than these two statements.

Second, Figgie engages in a tortured analysis to suggest that it never made the "hot, flaming fires" statement, but that the Commission constructed it out of bits and pieces of separate promotional materials that were simultaneously in use for only six months. Despite Figgie's protestations to the contrary, this is an impermissible attempt to relitigate the Commission's conclusive findings. The Commission found that Figgie made the claim. Comm'n at 392. Section 19 prohibits the court from looking behind this finding.

B. Specific Intent

The Federal Trade Commission has two powers relevant to this case, to deal with deceptive trade practices. If satisfied that a firm has been or is using a deceptive practice affecting commerce, the FTC may, after satisfying procedural requirements, order it to cease and desist from

the violation. 15 U.S.C. § 45(b). In addition, under 15 U.S.C. § 57b(a)(2),

> If any person, partnership, or corporation engages in any unfair or deceptive act or practice (within the meaning of section 45(a)(1) of this title) with respect to which the Commission has issued a final cease and desist order which is applicable to such person, partnership, or corporation, then the Commission may commence a civil action against such person, partnership, or corporation in a United States district court or in any court of competent jurisdiction of a State. If the Commission satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent, the court may grant relief under subsection (b) of this section.

15 U.S.C. § 57b(a)(2).

The case before us involves only the redress remedy, not the cease and desist remedy. The latter affects only future conduct. The redress remedy relates to past conduct and requires proof of the extra element that a reasonable person would have known under the circumstances that the practice was dishonest or fraudulent. In this case liability for past conduct would be imposed on Figgie if a reasonable person would have known in the circumstances that it was dishonest or fraudulent for Figgie to use the practices it did to sell heat detectors.

Figgie would have us construe "reasonable person would have known" to require actual knowledge. Although Figgie's argument finds some support in *FTC v.*

AMREP Corp., 705 F.Supp. 119, 127 (S.D.N.Y.1988), that court's construction does not fit the words and grammar of the statute. Congress unambiguously referred the district court to the state of mind of a hypothetical reasonable person, not the knowledge of the defendant. The standard is objective, not subjective. That Figgie's Vice President-Marketing was innocent of any dishonest intentions, as his declarations establish for purposes of summary judgment, may be probative as to whether a reasonable person would also have been innocent of such intentions, but the issue of law is what a reasonable person would have known, not what Figgie's executive knew. The statute is unambiguous.

C. Dishonest or Fraudulent Practices

Figgie correctly argues that the Commission's findings describing an "unfair or deceptive" trade practice under Section 5 do not necessarily describe a "dishonest or fraudulent" one under Section 19. Section 19 liability must not be a rubber stamp of Section 5 liability. Figgie appears to argue, however, that the Commission's findings alone can never be the basis of Section 19 liability. We disagree. When the findings of the Commission in respect to the defendant's practices are such that a reasonable person would know that the defendant's practices were dishonest or fraudulent, the district need not engage in further fact finding other than to make the ultimate determination that a reasonable person would know. This is such a case.

Figgie sold its product to the public on the basis of misrepresentations as to its effectiveness as a fire safety

device. Specifically, Figgie misled customers about "the single most useful piece of information" they could have used: that smoke detectors provide earlier warnings for almost all residential fires. Comm'n at 395. Further, it failed to warn that in most instances the warning from heat detectors would come too late to save lives. There is ample evidence in the Commission's findings to satisfy a court that a reasonable person with Figgie's access to the scientific data establishing the relative inferiority of heat detectors would have known that Figgie's vigorous misrepresentations on their behalf were dishonest and fraudulent.

The fact that heat detectors have some value does not alter this conclusion. Figgie's liability under Section 19 is premised not on the fact that Figgie sold heat detectors, but on the dishonest or fraudulent practices it used to sell them. The sales practices were the object of the cease and desist order. From the outset of the Section 5 proceeding, the Commission's concern was with whether "promotional materials supplied to and used by Figgie distributors during in-home sales presentations contain express and implied effectiveness claims for Vanguard heat detectors which are deceptive and unfair." ALJ at 315. By way of analogy, there is nothing dishonest about selling rhinestone jewelry; it has some value. However, it is dishonest to represent that rhinestone jewelry is actually diamond, and to charge diamond prices for it. A district court may properly find that a rhinestone merchant who engages in such practices has behaved in a way that a reasonable person in the circumstances would have known was dishonest or fraudulent.

Figgie frequently argues that some of the representations that the Commission found false or misleading were implied, not express. This is a distinction without a difference. Figgie can point to nothing in statute or case law which protects from liability those who merely imply their deceptive claims; there is no such loophole.

Figgie argues that a reasonable person could conclude that Vanguard heat detectors provide adequate warning to escape fire despite the results of the Indiana Dunes and Cal Chief's tests. Both tests assumed that escape from a burning home would be difficult or impossible at heat levels of 150 F. and smoke obscuration of 15% per foot. Figgie argues that these "tenability limits" are arbitrary, and that a reasonable person could believe that escape is possible under more extreme conditions. Therefore, test results indicating that heat detectors provide inadequate warning of unrealistically low tenability limits do not mean that heat detectors are ineffective warning devices in practice.

The ALJ did acknowledge a debate among fire professionals as to the proper tenability limits. ALJ ¶ 157. However, he concluded that the "record leaves no doubt that there is substantial agreement now among fire scientists, on the basis of current learning, as to what these limits should be, and they appear to have a rational, scientific basis." *Id.* Specifically, the "150 F. heat tenability limit appears to be reasonable." ALJ ¶ 158. The Commission also rejected Figgie's attack on the tenability limits. It acknowledged that some persons could survive greater exposure to heat and smoke, but that "it is reasonable to assume that many others would suffer death or serious injury" at the tenability limits. Comm'n at 387. To the

extent that the Commission determined the reasonable reading of the test results, its finding is conclusive.

A reasonable person would have known in the circumstances that selling the heat detectors as Figgie did was dishonest or fraudulent. A consensus among experts, well supported by careful testing, established that smoke detectors almost always provide earlier warning than heat detectors, and Figgie had no basis for doubting the truth of this consensus, yet Figgie marketed its heat detectors in a manner designed to mislead consumers about this critical information. As the Commission found, "the fact that smoke detectors almost always provide earlier warning than heat detectors would seem to be the single most useful piece of information that could be provided to potential purchasers of residential fire protection systems." Comm'n at 395. Figgie never provided this information to consumers, preferring to disparage the value of smoke detectors instead.

Figgie argues that it was reasonable to act on its own interpretation of the test results until the time the Commission's cease and desist order became final. We disagree. The Commission found that Figgie's marketing practices were deceptive in light of the test fires and the NFPA's rule changes. Once that information became available in the late 1970's, it was unreasonable for Figgie to ignore it. If Figgie's practices were "dishonest or fraudulent", it is because of their relationship to the known facts of fire safety, not their relationship to the history of this litigation.

II. REMEDY

The district court ordered that Figgie pay into an escrow account to be managed by the Commission. "These funds shall be used to provide direct redress to consumers who purchased Vanguard heat detectors during [the redress period] and who can make a valid claim for such redress through the plaintiff, including prejudgment interest from the date of purchase (and to pay any attendant expenses of administration.)" At a minimum, Figgie would pay the amount of its profits, $7,590,000. At a maximum, Figgie would pay $49,950,000, the amount spent by consumers. Figgie challenges this order on several grounds.

A. Consumer Injury

The relevant statutory language provides that

> The court in an action under subsection (a) of this section shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violation or the unfair or deceptive act or practice, as the case may be. Such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice, as the case may be; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.

15 U.S.C. § 57b(b).

The power bestowed is to "grant such relief as the court finds necessary to redress injury to consumers" resulting from dishonest or fraudulent trade practices. 15 U.S.C. § 57b(b). It follows, therefore, that there may be no redress without proof of injury caused by those practices. And the relief must be necessary to redress the injury.

1. Individual Reliance by Consumers

Figgie argues that because its liability is premised on certain misrepresentations or misleading statements, only those consumers that can prove that they purchased a Vanguard heat detector in reliance on those statements should be entitled to redress. As a factual matter, Figgie's argument that the district court had no proof of reliance is incorrect. Figgie's sales materials advocated the purchase of four or five heat detectors per smoke detector, and that matches Figgie's actual sales ratio. "It is reasonable to conclude from the record evidence that consumers purchased Vanguard heat detectors in reliance upon respondent's express and implied claim that heat detectors will provide necessary warning to allow a safe escape in most residential fires." ALJ ¶ 192.

Figgie's claim is also incorrect as a matter of law. It is well established with regard to Section 13 of the FTC Act (which gives district courts the power to order equitable relief) that proof of individual reliance by each purchasing customer is not needed.

> Proof of reliance by the consumer upon the defendants' misrepresentations is a traditional element of recovery under common law fraud actions. Section 13 of the FTC Act differs from a

> private suit for fraud, however. Section 13 serves a public purpose by authorizing the Commission to seek redress on behalf of injured consumers. Requiring proof of subjective reliance by each individual consumer would thwart effective prosecutions of large consumer redress actions and frustrate the statutory goals of the section.

FTC v. Kitco of Nevada, Inc., 612 F.Supp. 1282, 1293 (D.C.Minn.1985). *See also FTC v. Security Rare Coin & Bullion*, 931 F.2d 1312, 1316 (8th Cir.1991). A presumption of actual reliance arises once the Commission has proved that the defendant made material misrepresentations, that they were widely disseminated, and that consumers purchased the defendant's product. *Id.; Kitco*, 612 F.Supp. at 1293; *FTC v. International Diamond Corp.*, 1983-2 Trade Cases ¶ 65,725, p. 69,709, 1983 WL 1911 (N.D.Cal.1983) ("*Diamond II*"). Some courts hold that at this point, the burden shifts to the defendant to prove the absence of reliance. *Id.; Kitco*, 612 F.Supp. at 1293. The same reasoning is applicable to Section 19. Because Figgie has presented no evidence to rebut the presumption of reliance, injury to consumers has been established.

2. Amount of Refund Needed to Redress Injury

The Commission did not attempt to prove deaths or physical injuries resulting from the installation of Vanguard heat detectors rather than smoke detectors. The injury to consumers it sought to establish is the amount consumers spent on the heat detectors that would not have been spent absent Figgie's dishonest practices.

The district court ordered that consumers be allowed to receive full refunds for their Vanguard heat detectors, whose value, "given the misrepresentations recommenced by Figgie and made by distributors to consumers, is de minimis." Figgie protests that the "de minimis" finding and the resulting full refund are inappropriate in light of the Commission's conclusive finding that heat detectors have some value. Although we agree with Figgie that the district court is not free to make this finding, we find the error harmless. Courts have previously rejected the contention "that restitution is available only when the goods purchased are essentially worthless." *FTC v. International Diamond Corp.*, 1983-2 Trade Cases ¶ 65,506, p. 68,459, 1983 WL 1851 (N.D.Cal.1983) ("*Diamond I*").

To understand why, we return to the hypothetical dishonest rhinestone merchant, Customers who purchased rhinestones sold as diamonds should have the opportunity to get all of their money back. We would not limit their recovery to the difference between what they paid and a fair price for rhinestones. The seller's misrepresentations tainted the customers' purchasing decisions. If they had been told the truth, perhaps they would not have bought rhinestones at all or only some. The district court implied this notion of a tainted purchasing decision with its qualification "given the misrepresentations recommended by Figgie and made by distributors to consumers." The fraud in the selling, not the value of the thing sold, is what entitles consumers in this case to full refunds or to refunds for each detector that is not useful to them.

The district court's order creates no windfall for Figgie's customers. Refunds are available to those buyers "who can made a valid claim for such redress." Those who paid less than the $170 figure challenged by Figgie (and discussed *infra*) will therefore obtain redress based on the lesser figure. Those consumers who decide, after advertising which corrects the deceptions by which Figgie sold them the heat detectors, that nevertheless the heat detectors serve their needs, may then make the informed choice to keep their heat detectors instead of returning them for refunds.

Figgie also objects that the district court's order forces Figgie to pay for losses beyond its gains. Figgie does not contest the award of prejudgment interest and bases its argument instead on the role of the distributor in this marketing system. Figgie sells heat detectors for cash to distributors, who apparently have complete discretion to set their own mark-ups. Many consumer dollars therefore go into the distributors' pockets, not Figgie's.

This objection may be met several ways. First, Section 19(b) does not limit its remedies to the amount of the unjust enrichment. Statutory remedies include "the payment of damages." There is no question but that Figgie, which designed, authorized and supervised the dishonest sales presentations, was the proximate cause of consumers' loss. It may be held responsible for the damages it caused. Second, familiar principles of restitution support the district court's order. "While ordinarily the proper measure of restitution is the amount of enrichment received, if the loss suffered by the victim is greater than the unjust benefit received by the defendant, the

proper measure of restitution may be to restore the status quo." *Diamond I*, 1983-2 Trade Cases at p. 68,459. "As between the innocent purchaser and the wrongdoer who, though not a privy to the fraudulent contract, nonetheless induced the victim to make the purchase, equity requires the wrongdoer to restore the victim to the status quo." *Id.*, quoting *Gordon v. Burr*, 506 F.2d 1080, 1085 (2d Cir.1974). *See also Kitco*, 612 F.Supp. at 1295-96.

B. Minimum Redress

Relief under Section 19(b) "may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting . . . the unfair or deceptive act or practice . . . ; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages." The district court's judgment required that, at a minimum, Figgie be denied all of its profits from the redress period. Unclaimed money from the redress fund will be used for "indirect redress" in the form of corrective advertisements or donations to non-profit fire safety organizations. Figgie argues that the minimum redress provision amounts to an award of punitive damages forbidden by the statute.

Section 19(b) expressly contemplates corrective advertising in its "public notification" clause. The portion of the order that is questionable and could be barred as punitive is the provision for distributing unclaimed funds to non-profit fire safety organizations. We do find this portion in effect to be punitive. We can see no basis for allowing the Commission to keep money in excess of

what it reasonably spends to find purchasers of the heat detectors, advertise to them the availability of the money and the importance of using smoke rather than heat detectors at appropriate locations, and process their claims and reimburse them. The FTC argues that it should be allowed to keep the money because it is in the nature of disgorgement, but the statute authorizes only "redress . . . to consumers," and specifically prohibits the imposition of "exemplary or punitive damages." 15 U.S.C. § 57b(b). If disgorgement of Figgie's receipts would exceed redress to consumers, then in the circumstances of this case requiring Figgie to pay the Commission the excess would be for purposes of punishing Figgie, not making redress to the consumers who bought heat detectors. Not all the receipts for heat detectors need be the result of deceptive practices, because the Commission found that the heat detectors had value, might reasonably have been purchased by some consumers, and that some of the claims made for them in the promotional materials were true. Because Congress provided for "redress," Figgie's receipts and profits provide neither the top nor the bottom limit of the remedy.

The district court's order provides that any unrefunded money be distributed by "donation to one or more nonprofit entities, at the dirscretion of the Commission, for the support of research, fellowships or consumer education in the field of fire safety." This extraordinary provision cannot be characterized as "redress." The word connotes making amends to someone who has been wronged. The nonprofit organizations, recipients of fellowships, researchers, and educators who might receive the money under this portion of the order were not

wronged by Figgie's deceptive sales methods. Calling a fine "indirect redress" does not make it redress. An adjective, such as "indirect," cannot be used to exceed the statutory limitation on the remedy. Congress expressly prohibited exemplary or punitive damages under § 57b(b), so we know that its intent was not to punish deceptive trade practices, only to authorize redress to consumers and others for "injury resulting" from the trade practice. This portion of the award was outside the boundaries of the discretion given to the district court by the statute. The FTC cites cases under other statutes in which similar remedies have been upheld,[2] but in none of these does the statute limit recovery to redress the expressly prohibit exemplary or punitive damages. The district court should modify its order to provide for refund to Figgie of any funds not expended for authorized purposes.

C. Maximum Redress

The district court further held that if consumers claim more than the amount of Figgie's profits, Figgie would be liable to a maximum of $49.95 million, based on an average price per heat detector of $170. Figgie claims that the district court had no evidence to support the

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[2] *Citronelle-Mobile Gathering, Inc. v. Edwards*, 669 F.2d 717, 722-23 (TECA), *cert. denied*, 459 U.S. 877, 103 S.Ct. 172, 74 L.Ed.2d 141 (1982); *SEC v. Blavin*, 760 F.2d 706, 713 (6th Cir.1985); *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1308 (9th Cir.1990); *Hodgson v. YB Quezada*, 498 F.2d 5, 6 (9th Cir.1974); *In re Folding Carton Antitrust Litigation*, 744 F.2d 1252, 1255 (7th Cir.1984); *SEC v. Lund*, 570 F.Supp. 1397, 1404-05 (C.D.Cal.1983).

price. This figure was based on the declaration of Marjorie Lakin Erickson, an FTC director who compiled the prices described in 127 letters of complaint received from Vanguard customers. Figgie objected before the district court and this court that the declaration is hearsay. Because Federal Rule of Evidence 1006 permits the summarization of documents so long as the opposing party has opportunity to examine the originals (which Figgie did in this case), Figgie's objection is only valid if the letters themselves are inadmissible. *Keith v. Volpe*, 858 F.2d 467, 478-80 (9th Cir.1988), *cert. denied*, 493 U.S. 813, 110 S.Ct. 61, 107 L.Ed.2d 28 (1989).

The letters from consumers do not fit squarely under any of the enumerated exceptions to the hearsay rule as codified by Federal Rules of Evidence 803(1)-(23). They are, however, admissible under the "catch-all" or "residual" exception, Federal Rule of Evidence 803(24):

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, [is not excluded] if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it[.]

This Rule faciliates "the admission of needed, relevant, reliable evidence which does not conform to a class exception." 4 Weinstein & Berger, Evidence, ¶ 803(24)[01] (1984) at 803-381. A court's most important inquiry under this rule is whether the proffered evidence has trustworthiness equivalent to that of the enumerated hearsay exceptions. *Larez v. City of Los Angeles*, 946 F.2d 630, 642 (9th Cir.1991). Its use in criminal trials must satisfy the rigors of the confrontation clause, *United States v. George*, 960 F.2d 97, 100 (9th Cir.1992), but its use in this civil case presents no constitutional questions.

District courts must make detailed findings when admitting evidence under Rule 803(24). In the absence of such findings, an appellate court may review the record to determine if the prerequisites to admissibility have been met. *Mutuelles Unies v. Kroll & Linstrom*, 957 F.2d at 100. The district court in this case made no findings, perhaps because the parties failed to frame the question in terms of Rule 803(24). The district court's error in failing to make findings is harmless in this case, however, because the letters in question clearly satisfy the five elements of the Rule.

First, they have the necessary "circumstantial guarantees of trustworthiness." The letters were sent independently to the FTC from unrelated members of the public. The fact that they all reported roughly similar experiences suggests their truthfulness. Furthermore, the declarants had no motive to lie to the FTC regarding the price they paid for their heat detectors. There is little risk that the prices listed in their letters were "the product of faulty perception, memory or meaning, the dangers

against which the hearsay rule seeks to guard." 4 Weinstein & Berger at 803-375.

Second, the price of the heat detector is a material fact.

Third, "reasonable efforts" would not produce more probative evidence. Conceivably, FTC could bring letter-writers into court to swear, under oath and subject to cross-examination, that the contents of their letters were true. But such efforts would not be reasonable. "It should not be necessary to scale the highest mountains of Tibet to obtain a deposition for use in a $500 damage claim arising from an accident with a postal truck." *Id.* at 803-379. Furthermore, testimony from the letter-writers is not likely to be any more reliable than the letters themselves. *See Dallas County v. Commercial Union Assurance Co.*, 286 F.2d 388 (5th Cir. 1961) (contemporary report of a fire in a newspaper article "is more reliable, more trustworthy, more competent evidence than the testimony of a witness called to the stand fifty-eight years later").

Fourth, admitting the letters "furthers the federal rules' paramount goal of making relevant evidence admissible." 4 Weinstein & Berger at 803-381. It also furthers the interests of justice by allowing the district court to establish the size of the redress fund so that it correlates to consumers' losses.

Fifth, Figgie had adequate notice of the letters. It could not have offered its generalized hearsay objection to the district court without knowing of them.

Because the letters were admissible to prove the prices paid by consumers, and because Figgie has offered

no contrary evidence to suggest that they paid any other price, there is no genuine issue of material fact preventing summary judgment as to the maximum amount of redress.

Accordingly, the summary judgment on liability is AFFIRMED, but the summary judgment on damages is MODIFIED and the order VACATED for modification consistent with this opinion.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION, Plaintiff, vs. FIGGIE INTERNATIONAL, INC., Defendant.	No. CV 88-4335-RMT (Tx) ORDER DEEMING FINDINGS OF COMMISSION CONCLUSIVE (Filed June 13, 1989)

This matter having come before the court on the motion by plaintiff Federal Trade Commission for an order deeming findings of fact #1 through #46 of the Federal Trade Commission to be conclusive herein, and this court having considered the pleadings and other documents filed herein,

IT IS ORDERED that the motion by plaintiff is granted, and the following findings of fact are hereby deemed conclusive:

FINDING #1:

Consumers reasonably would have interpreted Figgie's promotional materials as making the claim that Vanguard heat detectors provide the necessary warning to allow safe escape from most residential fires.

FINDINGS #2:

Figgie expressly represented that its combined system of heat detectors and smoke detectors provides significantly greater fire warning protection than smoke detectors alone.

FINDING #3:

The representations that (a) Vanguard heat detectors give enough warning of most fires to allow safe escape, and (b) a fire warning system incorporating Vanguard heat detectors provides significantly more protection than one that does not, are material, *i.e.*, likely to affect a consumer's choice of whether to purchase a Vanguard system. Both representations concerned the single most important characteristics of the Vanguard heat detector: its effectiveness as a fire warning device.

FINDING #4:

The California Fire Chiefs' Association Residential Fire Detection Test Program, also known as the "Cal Chiefs' Tests," was jointly sponsored by the California Fire Chiefs' Association and the Los Angeles City Fire Department in 1978.

FINDING #5:

The objective of the Cal Chiefs' Tests was to investigate and report on residential fire detector response, reliability, and life safety potentials under realistic conditions, *i.e.*, uncontrolled fire development in actual dwellings.

FINDING #6:

The Cal Chiefs' Tests were designed and administered by expert professionals working on behalf of respected fire protection organizations, private testing laboratories, and government agencies.

FINDING #7:

The Cal Chiefs' Tests were funded by contributions from a number of sources, including Figgie.

FINDING #8:

The chief engineer of Figgie's Interstate Engineering Division, Mr. Gallagher, was consultant to the planning committee of the Cal Chief's Tests and performed a major role in planning test procedures.

FINDING #9:

The Cal Chiefs' Tests tested the performance of Vanguard heat detectors directly in test fire scenarios that closely resembled actual residential fire situations.

FINDING #10:

Although the original test design involved only typical fatal fire scenarios, Edward Gallagher of Figgie insisted that more flaming-type kitchen fires be included in the Cal Chiefs' Test. Despite the fact that a relatively small number of fatalities are caused by kitchen fires, the design was revised to include 24 kitchen fires in the total 71 test fires that collectively comprised the Cal Chiefs' Test.

FINDING #11:

Elaborate scientific instrumentation was used in the Cal Chiefs' Tests to collect millions of individual data concerning the environmental conditions produced by the test fires and performance of the fire detection devices being tested.

FINDING #12:

Evaluation of detector performance in the Cal Chiefs' Tests was based on the amount of "escape time" each detector provided. The escape time attributed to a detector equaled the length of time between the activation of the detector and the onset of hazardous levels, or "tenability limits," of heat, smoke or toxic gases within the room.

FINDING #13:

Smoke detectors in the Cal Chiefs' Tests usually provided two to six minutes' escape time before any of the hazardous conditions developed.

FINDING #14:

In the Cal Chiefs' Tests, the heat detectors never activated more than 1.3 minutes prior to the onset of any of the hazardous conditions.

FINDING #15:

In 92% of the Cal Chiefs' Tests' fires, the earliest-sounding heat detector did not activate until after a tenability limit had been reached.

FINDING #16:

In all but one of the Cal Chiefs' Tests' fires, the earliest-sounding heat detector did not activate until after at least one smoke detector had already activated. In one test fire, the earliest-sounding heat detector and the earliest-sounding smoke detector activated at the same time.

FINDING #17:

The results of the Cal Chiefs' Tests were consistent with the results of other fire detection device studies.

FINDING #18:

The data collected in the Cal Chiefs' Tests were carefully analyzed, and detailed reports describing those analysis were published. These reports are considered reliable authority by residential fire protection experts and have resulted in numerous revisions to state and local regulations setting minimum standards for residential fire detection devices.

FINDING #19:

The National Bureau of Standards and Underwriters' Laboratories conducted two series of fire-detection tests between 1974 and 1976 known as the "Indiana Dunes Tests" ("Dunes Tests").

FINDING #20:

The Dunes Tests were conducted in actual homes under conditions that closely simulated those that would exist in typical residential fires.

FINDING #21:

The testing methodology used in the Dunes Tests was generally similar to that used in the Cal Chiefs' Tests.

FINDING #22:

In the first series of Dunes Tests ("Dunes I"), smoke detectors and thermocouples were tested. Thermocouples were used to simulate the performance of fixed-temperature heat detectors, such as Vanguard.

FINDING #23:

Elaborate scientific instrumentation was used in the Dunes Tests to collect millions of individual data concerning the environmental conditions produced by the test fires and performance of the fire detection devices being tested.

FINDING #24:

In each of the 37 Dunes I test fires, the first detector to sound an alarm was a smoke detector.

FINDING #25:

The earliest-sounding smoke detectors in Dunes I provided an average escape time of 18.6 minutes.

FINDING #26:

The earliest-sounding thermocouples in Dunes I provided an average escape time of negative 2.2 minutes, *i.e.*, the first thermocouples to alarm in the 37 test fires sounded an average of 2.2 minutes after one of the tenability limits had been reached.

FINDING #27:

In response to criticism of Dunes I from the chief engineer of Figgie's Interstate Division, Edward Gallagher, Vanguard heat detectors were tested directly in a second series of test fires ("Dunes II").

FINDING #28:

The Vanguard heat detectors used Dunes II performed considerably more poorly than did the thermocouples tested in Dunes I.

FINDING #29:

Whereas the thermocouples tested in Dunes I gave three minutes or more escape time in 5 of 37 Dunes I test fires, the Vanguard heat detectors tested in Dunes II never provided as much as three minutes escape time in the 22 Dunes II test fires.

FINDING #30:

The Dunes Tests results are consistent with the results of similar fire tests conducted over the years.

FINDING #31:

The data collected in the Dunes Tests were carefully analyzed, and detailed reports describing those analysis were published. These reports are considered reliable authority by residential fire protection experts and have resulted in numerous revisions to state and local regulations setting minimum standards for residential fire detection devices.

FINDING #32:

The Cal Chiefs' Tests and Dunes Tests show that smoke detectors provide significantly earlier warning of potentially dangerous conditions resulting from a residential fire than do heat detectors.

FINDING #33:

Heat detectors often provide no advance warning of a fire at all.

FINDING #34:

The limited acecdotal evidence from Vanguard purchasers concerning Vanguard performance that was introduced by Figgie says nothing about whether Vanguard heat detectors provide the necessary warning in most fires.

FINDING #35:

Heat detectors do not provide the necessary warning to allow safe escape in most residential fires.

FINDING #36:

Figgie's claims that its heat detectors provide significant additional protection because they respond more quickly than smoke detectors to hot, flaming fires are false.

FINDING #37:

Figgie's distributors sold the Vanguard heat and smoke detectors through in-home sales presentations to consumers.

FINDING #38:

In the course and conduct of its business, Figgie exercised substantial control over the promotional practices of its distributors regarding the sale of Vanguard heat and smoke detectors, including the content of the sales presentations.

FINDING #39:

Figgie developed, produced and sold to distributors promotional materials for the very purpose of promoting and selling the Vanguard heat and smoke detectors to consumers.

FINDING #40:

Most of the promotional materials prepared, produced and disseminated by Figgie contained performance claims relating to Vanguard heat detectors.

FINDING #41:

Figgie knew of and approved the use of its promotional materials by distributors during in-home sales presentations.

FINDING #42:

Figgie trained the distributors how to use the promotional materials during in-home sales presentations of Vanguard Heat detectors.

FINDING #43:

Figgie advised and encouraged the distributors to use the promotional materials during in-home sales presentations.

FINDING #44:

The promotional material constituted a major portion of the sales presentation made by the distributors to consumers.

FINDING #45:

Consumers acted upon Figgie's representations in purchasing Vanguard heat detectors.

FINDING #46:

Figgie knew or should have known of the limitations of heat detector performance yet continued to disseminate promotional materials containing false performance claims for Vanguard heat detectors while disparaging smoke detectors.

Dated: Illegible

/s/ Robert M. Takasugi
ROBERT M. TAKASUGI
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION, Plaintiff, vs. FIGGIE INTERNATIONAL, Defendant.	No. CV 88-04335-RMT(Tx) FINDINGS OF FACT AND CONCLUSIONS OF LAW (Filed Feb. 9, 1990)

This matter having come before the court on the motion by plaintiff for summary judgment as to defendant's liability for redress, and the court having considered the pleadings and other documents filed herein, the court now makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

The following facts have been deemed conclusive by an order of the court entered June 13, 1989 and are therefore uncontroverted:

1. Consumers reasonably would have interpreted Figgie's promotional materials as making the claim that Vanguard heat detectors provide the necessary warning to allow safe escape from most residential fires.

2. Figgie expressly represented that its combined system of heat detectors and smoke detectors provides

significantly greater fire warning protection than smoke detectors alone.

3. The representations that (a) Vanguard heat detectors give enough warning of most fires to allow safe escape, and (b) a fire warning system incorporating Vanguard heat detectors provides significantly more protection than one that does not, are material, i.e., likely to affect a consumer's choice of whether to purchase a Vanguard system.

4. The California Fire Chiefs' Association Residential Fire Detection Test Program, also known as the "Cal Chiefs' Tests," was jointly sponsored by the California Fire Chiefs' Association and the Los Angeles City Fire Department in 1978.

5. The objective of the Cal Chiefs' Tests was to investigate and report on residential fire detector response, reliability, and life safety potentials under realistic conditions (i.e., uncontrolled fire development in actual dwellings).

6. The Cal Chiefs' Tests were designed and administered by expert professionals working on behalf of respected fire protection organizations, private testing laboratories, and government agencies.

7. The Cal Chiefs' Tests were funded by contributions from a number of sources, including Figgie.

8. The chief engineer of Figgie's Interstate Engineering Division, Mr. Gallagher, was a consultant to the planning committee of the Cal Chief's Tests.

9. The Cal Chiefs' Tests tested the performance of Vanguard heat detectors directly in test fire scenarios that closely resembled actual residential fire situations.

10. Although the original test design involved only typical fatal fire scenarios, Edward Gallagher of Figgie insisted that more flaming-type kitchen fires be included in the Cal Chiefs' Tests. Despite the fact that a relatively small number of fatalities are caused by kitchen fires, the design was revised to include 24 kitchen fires in the total 71 test fires that collectively comprised the Cal Chiefs' Tests.

11. Scientific instrumentation was used in the Cal Chiefs' Test to collect over two million pieces of data concerning the environmental conditions produced by the test fires and performance of the fire detection devices being tested.

12. Evaluation of detector performance in the Cal Chiefs' Tests was based on the amount of "escape time" each detector provided. The escape time attributed to a detector equalled the length of time between the activation of the detector and the onset of hazardous levels, or "tenability limits," of heat, smoke or toxic gases within the room.

13. Smoke detectors in the Cal Chiefs' Tests usually provided two to six minutes' escape time before any of the hazardous conditions developed.

14. In the Cal Chiefs' Tests, the heat detectors never activated more than 1.3 minutes prior to the onset of any of the hazardous conditions.

15. In 92% of the Cal Chiefs' test fires, the earliest-sounding heat detector did not activate until after a tenability limit had been reached.

16. In all but one of the Cal Chiefs' test fires, the earliest-sounding heat detector did not activate until after at least one smoke detector had already activated. In one test fire, the earliest-sounding heat detector and the earliest-sounding smoke detector activated at the same time.

17. The data collected in the Cal Chiefs' Tests were carefully analyzed, and detailed reports describing those analyses were published. These reports are considered reliable authority by residential fire protection experts and have resulted in numerous revisions to state and local regulations setting minimum standards for residential fire detection devices.

18. The National Bureau of Standards and Underwriters' Laboratories conducted two series of fire-detection tests between 1974 and 1976 known as the "Indiana Dunes Tests" ("Dunes Tests").

19. The Dunes Tests were conducted in actual homes under conditions that closely simulated those that would exist in typical residential fires.

20. The testing methodology used in the Dunes Tests was generally similar to that used in the Cal Chiefs' Tests.

21. In the first series of Dunes Tests ("Dunes I"), smoke detectors and thermocouples were tested. Thermocouples were used to simulate the performance of fixed-temperature heat detectors, such as Vanguard.

22. In each of the 37 Dunes I test fires, the first detector to sound an alarm was a smoke detector.

23. The earliest-sounding smoke detectors in Dunes I provided an average escape time of 18.6 minutes.

24. The earliest-sounding thermocouples in Dunes I provided an average escape time of negative 2.2 minutes, i.e., the first thermocouples to alarm in the 37 test fires sounded an average of 2.2 minutes after one of the tenability limits had been reached.

25. In response to criticism of Dunes I from the chief engineer of Figgie's Interstate Division, Edward Gallagher, Vanguard heat detectors were tested directly in a second series of test fires ("Dunes II").

26. The Vanguard heat detectors used in Dunes II performed considerably more poorly than did the thermocouples tested in Dunes I.

27. Whereas the thermocouples tested in Dunes I gave three minutes or more escape time in 5 of 37 Dunes I test fires, the Vanguard heat detectors tested in Dunes II never provided as much as three minutes escape time in the 22 Dunes II test fires.

28. The data collected in the Dunes Tests were carefully analyzed, and detailed reports describing those analyses were published. These reports are considered reliable authority by residential fire protection experts and have resulted in numerous revisions to state and local regulations setting minimum standards for residential fire detection devices.

29. The Cal Chiefs' Tests and Dunes Tests show that smoke detectors provide significantly earlier warning of

potentially dangerous conditions resulting from a residential fire than do heat detectors.

30. Heat detectors often provide no advance warning of a fire at all.

31. Heat detectors do not provide the necessary warning to allow safe escape in most residential fires.

32. Figgie's claims that its heat detectors provide significant additional protection because they respond more quickly than smoke detectors to hot, flaming fires are false.

33. Figgie's distributors sold the Vanguard heat and smoke detectors through in-home sales presentations to consumers.

34. In the course and conduct of its business, Figgie exercised substantial control over the promotional practices of its distributors regarding the sale of Vanguard heat and smoke detectors, including the content of the sales presentations.

35. Figgie developed, produced and sold to distributors promotional materials for the very purpose of promoting and selling the Vanguard heat and smoke detectors to consumers.

36. Most of the promotional materials prepared, produced and disseminated by Figgie contained performance claims relating to Vanguard heat detectors.

37. Figgie knew of and approved the use of its promotional materials by the distributors during in-home sales presentations.

38. Figgie trained the distributors how to use the promotional materials during in-home sales presentations of Vanguard heat detectors.

39. Figgie advised and recommended that the distributors use the promotional materials during in-home sales presentations.

40. The promotional materials constituted a major portion of the sales presentation made by the distributors to consumers.

41. Consumers acted upon Figgie's representations in purchasing Vanguard heat detectors.

42. Figgie knew or should have known of the limitations of heat detector performance yet continued to disseminate promotional materials containing false performance claims for Vanguard heat detectors while disparaging smoke detectors.

Any finding of fact which may be deemed a conclusion of law is incorporated into the Conclusions of Law section below, and any conclusion of law which may be deemed a finding of fact is incorporated into the Findings of Fact section above.

CONCLUSIONS OF LAW

1. A reasonable man under the circumstances would have known that Figgie's representations that a) Vanguard heat detectors provide the necessary warning to allow safe escape in most residential fires, and b) a combined system of heat detectors and smoke detectors

provides significantly greater warning than smoke detectors alone because heat detectors give earlier warning of hot, flaming fires were dishonest or fraudulent.

Dated: 2-9-90

/s/ Robert M. Takasugi
ROBERT M. TAKASUGI
United States
District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION,	)	No. CV 88-04335-RMT(Tx)
	)	ORDER GRANTING
Plaintiff,	)	SUMMARY JUDGMENT
	)	AS TO LIABILITY FOR
vs.	)	REDRESS
	)	
FIGGIE INTERNATIONAL,	)	(Filed Feb. 9, 1990)
	)	
Defendant.	)	
	)	

This matter having come before the court on the motion by plaintiff for summary judgment as to defendant's liability for redress, and this court having considered the pleadings and other documents filed herein and having filed findings of fact and conclusions of law concurrently herewith,

IT IS ORDERED that the motion is granted; defendant Figgie International, Inc. is liable for redress under § 19(a)(2) of the Federal Trade Commission Act, 15 U.S.C. § 57b(a)(2), to purchasers of heat detectors manufactured by defendant.

Dated: 2-9-90

/s/ Robert M. Takasugi
ROBERT M. TAKASUGI
United States
District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION,	)	No. CV 88-04335-RMT(Tx)
	)	ORDER RE SUMMARY JUDGMENT
Plaintiff,	)	
	)	(Filed
vs.	)	Jan. 14, 1991)
	)	
FIGGIE INTERNATIONAL,	)	
	)	
Defendant.	)	
	)	

This matter having come before the court on the motion by plaintiff, Federal Trade Commission, for summary judgment as to the amount of redress, and this court having considered the pleadings and other documents filed herein, and the court having set forth its findings of fact and conclusions of law, filed concurrently herewith,

IT IS ORDERED that the motion is granted pursuant to the judgment filed concurrently herewith.

Dated: 1-14-91

/s/ Robert M. Takasugi
ROBERT M. TAKASUGI
United States
District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION, Plaintiff, vs. FIGGIE INTERNATIONAL, Defendant.	No. CV 88-04335-RMT(Tx) FINDINGS OF FACT AND CONCLUSIONS OF LAW (Filed Jan. 14,1991)

This matter having come before the court on the motion by plaintiff, Federal Trade Commission, for summary judgment as to the amount of redress, and this court having previously granted summary judgment as to liability for redress, and this court having considered the pleadings and other documents filed herein, the court now sets forth its findings of fact and conclusions of law with regard to the amount of redress as follows:

FINDINGS OF FACT

1. Defendant, Figgie International, Inc. ("Figgie"), sold 293,824 heat detectors between May 17, 1980, and July 20, 1987. *See,* Irvin B. Sterner declaration (attached to defendant's opposition), page 7.

2. Figgie received $7,590,000 in gross revenues from the sale of Vanguard heat detectors between May 17, 1980, and July 20, 1987. *See,* Irvin B. Sterner declaration (attached to defendant's opposition), page 7.

3. Consumers who purchased Figgie's heat detectors paid an average of $170 per heat detector between May 17, 1980, and July 20, 1987.

4. During the time period from May 17, 1980, to July 20, 1987, Figgie continued to misrepresent to consumers that (a) Vanguard heat detectors provide the necessary warning to allow safe escape in most residential fires, and (b) a combined system of heat detectors and smoke detectors provide significantly greater warning than smoke detectors alone because heat detectors give earlier warning of hot, flaming fires.

5. The Vanguard heat detector's value, given the misrepresentations recommended by Figgie and made by distributors to consumers, is de minimis.

Any finding of fact which may be deemed a conclusion of law is hereby incorporated into the Conclusions of Law below, and any conclusion of law which may be deemed a finding of fact is hereby incorporated into the Findings of Fact above.

CONCLUSIONS OF LAW

1. While ordinarily the proper measure of restitution is the amount of unjust enrichment received, if the loss suffered by the victims is greater than the unjust benefit received by the defendant, the proper measure of restitution may be to restore the status quo by reimbursing the victims the amount paid. *FTC v. International Diamond Corp.*, 1983-2 Trade Cases (CCH) Para. 65, 506 (N.D.Cal. 1983). *See also, FTC v. Kitco of Nevada, Inc.*, 612

F.Supp. 1282 (D.Minn. 1985); *FTC v. H.N. Singer, Inc.*, 1982-83 Trade Cases (CCH) Para. 65,011 (N.D.Cal. 1982).

2. This case is one which justifies payment of the loss incurred by the consumers even if it exceeds the amount by which Figgie was unjustly enriched.

3. The minimum redress amount in this case in [sic] $7,590,000, the amount by which Figgie was unjustly enriched.

4. The maximum redress amount for which Figgie is responsible is $49,950,000, the amount which represents the combined total purchase price consumers paid for the Vanguard heat detectors. The actual amount is to be determined by the valid claims made by consumers upon the Federal Trade Commission pursuant to the judgment filed concurrently herewith.

Dated: JAN 14 1991

/s/ Robert M. Takasugi
ROBERT M. TAKASUGI
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION, Plaintiff, vs. FIGGIE INTERNATIONAL, Defendant.	No. CV 88-04335-RMT(Tx) JUDGMENT (Filed Jan. 14, 1991)

This matter having come before the court on the motion by plaintiff, Federal Trade Commission ("Commission"), for summary judgment as to the amount of redress, and this court having previously granted summary judgment as to liability for redress, and having considered the pleadings and other documents filed herein, and the court having set forth its findings of fact and conclusions of law, filed concurrently herewith,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiff Commission shall recover against defendant, Figgie International, Inc., the combined total purchase price consumers paid for the Vanguard heat detectors as follows:

Defendant Figgie International, Inc., is hereby directed to deposit the sum of $7,590,000 into an escrow account established and managed by the Commission. These funds shall be used to provide direct redress to consumers who purchased Vanguard Heat Detectors during the period May 17, 1980, through July 20, 1987, and who can make a valid claim for such redress through the plaintiff, including prejudgment interest from the date of

purchase (and to pay any attendant expenses of administration). If the Commission determines that redress to purchasers exceeds this sum, Figgie shall, upon petition to this court by the Commission and order by this court, be required to deposit additional funds up to the full judgment amount, which may not exceed $49,950,000. If the Commission determines that direct redress to purchasers in the full amount of $7,590,000 is wholly or partially impracticable, any funds not so used shall be used by the Commission to effectuate indirect redress to consumers by way of corrective advertising, and/or by donation to one or more nonprofit entities, at the discretion of the Commission, for the support of research, fellowships or consumer education in the field of fire safety.

Dated: JAN 14 1991

/s/ Robert M. Takasugi
ROBERT M. TAKASUGI
United States District Judge

EXHIBIT A

FIGGIE INTERNATIONAL, INC.

Complaint

IN THE MATTER OF

FIGGIE INTERNATIONAL, INC.

FINAL ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9166. Complaint, May 17, 1983 – Final Order, April 11, 1986

This final order requires, among other things, a Richmond, Va. manufacturer and seller of home heat detectors to provide notification that smoke detectors give earlier warning than heat detectors in nearly all residential fires to past purchasers of its heat detectors. Respondent must also disclose that fact in any future promotional materials that make claims about the residential fire protection provided by heat detectors. Additionally, respondent is prohibited from misrepresenting: (1) the performance characteristics of any heat or smoke detector, or any system containing both; or (2) any standard or recommendation established by the National Fire Protection Association or any other group concerning the fire warning systems.

Appearances

For the Commission: *Christopher Schwartz* and *David M. Malone.*

For the respondent: *Edwin S. Rockefeller* and *Leslie Donovan, Schiff, Hardin & Waite,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Figgie International, Inc., a corporation ("respondent") has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. Respondent, Figgie International, Inc., is an Ohio corporation with its principal place of business at 1000 Virginia Center Parkway, Richmond, Virginia.

PAR. 2. Respondent maintains a substantial course of business, including the acts and practices set forth hereinafter, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. Respondent manufacturers, advertises, offers for sale, sells and distributes residential fire alarm products including heat detectors and smoke detectors. Respondent's fire alarm products are sometimes identified by the trade name "Vanguard" and are sold to the public by respondent's distributors through in-home sales presentations. Respondent offers these products as fit for the purpose of affording fire warning protection to residential occupants.

PAR. 4. In order to sell its fire alarm products respondent has made numerous representations in various promotional and training materials it prepared and disseminated. Illustrative of respondent's representations are the following: